No. 76-1322

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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ELDON RAYBOURNE CHRISTIAN, PETITIONER

*v.*

UNITED STATES OF AMBRICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 549 F. 2d 1369. The order of the district court (Pet. App. C) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on February 22, 1977. The petition for a writ of certiorari was filed on March 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a magistrate may issue a search warrant authorizing the seizure, as evidence of violation of

the obscenity laws, of a commercially-shown film, without first viewing the film.

2. Whether the affidavit underlying the search warrant, by a police officer who saw the film and described it as depicting numerous explicit sexual acts, was sufficient to establish probable cause for issuance of the warrant.

## STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of using a common carrier for the carriage in interstate commerce of an obscene film, in violation of 18 U.S.C. 1462. He was sentenced to five years' imprisonment (all of which was suspended), five years' probation, and a $5,000 fine. The court of appeals affirmed (Pet. App. B; 549 F. 2d 1369).

Prior to trial, petitioner sought to suppress the film, "Sexual Customs in Scandinavia," because it had been unlawfully seized. The film was seized pursuant to a warrant by an Oklahoma state judge (Pet. App. D).[1] The warrant was issued pursuant to an affidavit, filed by an Oklahoma City police officer who had viewed the film at a theater in Oklahoma City, Oklahoma, stating that the film was evidence of a crime, and that it (Pet. App. D):

> * * * showed unnatural copulation and simulated natural sexual acts which were filthy, morally foul, polluted, nasty, dirty, vulgar, debasing, having a tendency to corrupt or debauch, indecent, morally offensive and depraving lascivious, wanton and lustful,

[1]The film was suppressed in the state criminal proceeding under a decision of the Court of Criminal Appeals of Oklahoma in *Hess* v. *State*, 536 P. 2d 366, 368, which read this Court's decision in *Heller* v. *New York*, 413 U.S. 483, as requiring that a neutral magistrate view a film prior to authorizing its seizure, absent exigent circumstances.



> lewd, licentious, lecherous, dissolute, debauched, impure, salacious and pornographic, depicting numerous scenes of sexual intercourse male and female, one female masturbating, and unnatural copulation between male and female * * *.

Several days later, state authorities seized a second "back-up" copy of the film that was intended to be shown if the first copy was seized (Pet. App. B 25).

The district court refused to suppress (Pet. App. C 26-29), concluding that since this Court had not decided that "a magistrate should view a film prior to issuing a warrant," it would not impose that requirement (Pet. App. C 29).[2] The court found the affidavit sufficient:

> * * * the affiant stated facts therein which were more than conclusory to the question of obscenity. The affidavit for search warrant indicates that it was sworn to before the Judge of the [state] District Court who issued said warrant and thus the Court had the opportunity to make any inquiry it felt necessary of the affiant concerning the facts set out in the affidavit in question. [Pet. App. C 29.]

In affirming (Pet. App. B 19-25; 549 F. 2d 1369), the court of appeals ruled, *inter alia*, that "[n]o showing was made that there was not available a prompt adversary hearing on the issue of obscenity in the state court immediately after the initial seizure" (Pet. App. B 25; 549 F. 2d at 1372). It further found that "the sexual activities explicitly decribed in the officer's affidavit were 'hard core' pornography, obscene,

[2]The court recognized that the Oklahoma court, in *Hess* v. *State*, 536 F. 2d 366 (Crim. App.) had read *Heller* as imposing such a requirement, but refused to extend the state ruling to federal prosecutions (Pet. App. C 29).

and constituted probable cause for the issuance of the warrant" (Pet. App. B 24; 549 F. 2d at 1371).

**ARGUMENT**

1. a. Petitioner contends that First Amendment values require that a magistrate must actually view an allegedly obscene film before he may find probable cause to issue a warrant for its seizure as evidence of a violation of anti-obscenity laws. In *Heller* v. *New York*, 413 U.S. 483, 490-492, the Court distinguished between seizure of a film to preserve it as evidence of crime, and seizure of films or books for the sole purpose of destruction. In the latter situation, "a prior judicial determination of obscenity in an adversary proceeding [is] required" (413 U.S. at 491) under *A Quantity of Books* v. *Kansas*, 378 U.S. 205, and *Marcus* v. *Search Warrant*, 367 U.S. 717. Under *Heller*, however, seizure to preserve a film as evidence of crime does not require an adversary hearing (413 U.S. at 492-493):

> If * * * a seizure [of an allegedly obscene film] is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned. [Footnotes omitted.]

While the magistrate in *Heller* had viewed the film before issuing a warrant for its seizure, the Court did



not hold there, and has never held, that such a viewing is constitutionally required before an allegedly obscene film may be seized. Cf. *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 637. The purpose of the seizure of the film here was to detain it for use as evidence in a subsequent criminal proceeding. Cf. *Heller* v. *New York*, *supra*, 413 U.S. at 492. The role of the magistrate was to determine whether there was probable cause to believe that the exhibition of the film violated the State's obscenity law. The affidavit of the police officer, who had viewed the film, provided sufficient information upon which the magistrate could base his probable cause determination. To require the magistrate to view the film before making that determination not only would impose an unnecessary burden on the judiciary, but often would change *ex parte* proceedings for the issuance of warrants into preliminary mini-trials of the ultimate issue of obscenity.

Although in *Lee Art Theatre*, *supra*, the Court left open the question whether the magistrate there should have viewed the film before issuing the warrant, the Court invalidated the seizure solely because the affidavit stated only the police officer's "conclusory assertions" that the film was obscene. In contrast, in the present case the affidavit explicitly stated the sexual activities shown in the film—activities that the court of appeals concluded "were 'hard core' pornography" (Pet. App. B 24).[3]

b. Petitioner also claims a First Amendment violation on the ground that the state seizure of the "back-up" copy of the film amounted to an "impermissible prior

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[3]See also *United States* v. *Pryba*, 502 F. 2d 391, 404 (C.A. D.C.); *United States* v. *Sherpix, Inc.*, 512 F. 2d 1361 (C.A. D.C.).

restraint" (Pet. 7).[4] However, he never requested the trial court in this case to order return of the "back-up" copy or permit him to copy the original. Having failed to seek such relief from either the federal or the state courts, petitioner cannot now complain that the seizure of the copy of the film constituted an illegal prior restraint upon its showing. Cf. *Heller, supra.*

2. The seizure in this case was based on "a constitutionally sufficient warrant * * *." *Roaden* v. *Kentucky*, 413 U.S. 496, 504. The supporting affidavit stated that the film (which the affiant had seen) showed "* * * unnatural copulation and simulated natural sexual acts * * *" and vulgarly depicted "* * * numerous scenes of sexual intercourse male and female, one female masturbating, and unnatural copulation between male and female * * *" (Pet. App. D 30). This description of the film "* * * afforded a basis upon which [the state judge] could reasonably issue a warrant." *United States* v. *Harris*, 403 U.S. 573, 580. *Miller* v. *California*, 413 U.S. 15.

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[4]There is nothing in the record to show when and how the state authorities obtained the "back-up" film. See Pet. App. B 25; 549 F. 2d at 1372. The United States Attorney has advised, however, that the "back-up" film was seized by the state authorities pursuant to a second search warrant.



## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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